No. 83-354

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1983

LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

-and-

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF FACTS

A. Introduction

The job classifications of "cleaner" and "laborer" at Madison Square Garden have historically been racially segregated, black and white respectively, despite the interrelationship, or often, the identical nature of the job tasks of the two groups.

Local 3 was the exclusive referrer of workers to the Garden for the position of laborer. This job is the higher paying and generally more desirable job.

Local 3's referral "policy" for this position was subjective, standardless, and based almost entirely on word of mouth and favoritism. This policy operated to deprive the cleaners, who made up the plaintiff classes, of the opportunity to become laborers. Indeed, prior to the Consent Decree with the Garden, no cleaner had ever been able to break the system and become a laborer, despite the identity of the job prerequisites for the positions.

B. Employment Structure at the Garden

Plaintiffs-respondents are black and hispanic cleaners at Madison Square Garden ("the Garden"). Cleaners sweep, mop, wash, etc. at the Garden.

The defendant-petitioner, Local Union #3, I.B.E.W. ("Local 3" or "the union") referred individuals to the Garden for the corrollary position of laborer until February, 1980.[1] It is also the

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1. On January 7, 1980, the District Court ordered that Local 3 maintain a referral register for the position of laborer at the Garden, post notices and submit a plan for same by February 11, 1980. Instead of regularizing its referral (Cont'd)

collective bargaining agent for laborers, once they have worked for thirty days at the Garden. Laborers effect the changeovers from one event to the next. The laborers also spend between one-third and one-half of each day performing tasks similar or identical to those performed by cleaners. The laborer job is more desirable on the basis of stated wage rates and actual earnings.

There were no independent qualifications for the job of either laborer or cleaner other than passing a basic physical examination. The Garden accepted prospective laborers referred by Local 3 on a first-come, first-served basis. Local 3 asked no questions of and knew little or nothing about the individuals it referred and imposed no examinations or prerequisites upon those individuals. By contrast, cleaners must pass the physical examination, present two letters of reference and demonstrate a willingness to work on weekends.

The laborer force at the Garden has historically been predominantly white. On January 1, 1965, all the laborers were white and had been since at least 1948. Between 1965 and 1969, of the twenty-two new laborers hired, twenty were white, one was black and one was hispanic. From 1969 through July, 1977, fifty-one laborers were hired; forty-four were white, five were black and two were hispanic. The cleaner work force, however, has historically been predominantly black. The lavatory attendants were all black in 1978, and have been all black since at least 1948.[2] The five day cleaners were all black between 1948 and 1969 and

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(Cont'd)

practices, Local 3, on February 25, 1980 stated that it "did not wish to play any further role in connection with the hiring of [laborers] at the Garden," thus mooting the Court's order (150a-151a).

2. Since 1972, 84 lavatory attendants have worked at the Garden. They have all been black.

in 1978, of the thirty-four five day cleaners, twenty-four were black, seven were hispanic and three were white.[3]

The chances were less than one in a thousand that the 1969 laborer force could have been drawn from a group with the same racial distributions as the most conservatively selected local labor market. When new laborer hires at the Garden in the seventies, either as a whole, or divided between 1970-1973 and 1974-1977, were compared to the racial composition of the 1969 laborer work force in the Garden there was no significant statistical change. The evidence of referral practices and the statistical evidence established that there was no relevant change in hiring practices or policies through the date of the trial.

Prior to the consent decree with the employers in this action, no cleaner had ever been able to transfer to a laborer position.

C. Laborer Hiring at the Garden and Local 3 Referrals

Since at least 1941, the hiring of laborers at the Garden had proceeded as follows: when a vacancy occurred the Garden superintendent either advised the Local 3 shop steward (currently and since 1968 Mr. Mel Mullins) or advised Local 3's business representative. Since 1969, Mr. James O'Hara had been Local 3's representative for laborers. Only O'Hara made referrals to the Garden for the position of laborer: when the superintendent contacted Mullins, Mullins informed O'Hara. All laborer hiring resulted from Local 3 referrals. The cleaners were not aware of the way to become a laborer until it was discovered in this litigation.

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3. From 1973 through July 1977, 50 permanent five-day cleaners worked at the Garden; 36 were black, 10 were hispanic and 4 were white.

The system used by Local 3 to select its referrals was subjective and standardless. The union had no procedure by which one could register for referral to the Garden as a laborer. The union did not keep any lists or records of workers seeking such a referral, of the Garden's requests for referrals or of the referrals actually made. Non-members who sought employment through the union offices were erroneously advised that there were unemployed union members and that these members were given preference for job referrals. Although the union did maintain a referral bank of unemployed members, it did not usually draw on this resource to refer laborers to the Garden. Indeed, virtually every white person referred to the Garden was not a Local 3 member at the time of referral. Since 1970 Local 3 referred Mr. O'Hara's acquaintances or friends or relatives of his acquaintances.

Local 3's referral system was a pattern and practice of discrimination that existed through the date of trial. The proof at trial contained current evidence as to both referral statistics and referral policy including laborer hires in 1974, 1976, 1977 and 1978.

D. Cleaner Attempts to Break the System

Without any guidelines as to how to go about it, and with the knowledge that it had never been done before, cleaners tried to apply for jobs as laborers — without success.

Some class members applied directly to the Garden superintendent or to his assistants. They were told that hiring was done through the union or that they should speak to the union shop steward.

In at least ten separate incidents, the Local 3 shop stewards gave cleaners varying information: that the shop steward had to speak to the delegate about it; that the Garden hired laborers;

that one must go out to the union hall; that it was impossible; or that one should communicate with the Garden superintendent's office. Those who followed this last suggestion were pingponged back to the union.

Two cleaners spoke to Local 3 officials at the union hall in Queens, New York. One was told (inaccurately) that the hall full of unemployed union members would have first preference for referral; the other filled out what he was told was an application for the job and heard nothing further. These attempts continued through 1978, and those who tried in 1978 received the same run-around as their predecessors had received.

No class member seeking to obtain the laborer position was ever given a clear explanation of how to become a laborer, *i.e.*, that Mr. O'Hara would have to make the referral.

The lack of an apparent referral procedure, the segregated work forces on the same site, the failure to refer any cleaners to a job as laborer, and the deliberately evasive and misleading actions on the part of the responsible union personnel who were authorized to speak for the union all contributed to "get the message across" and to create an atmosphere which discouraged class members from actively seeking a laborer position (33a-34a).

PRELIMINARY STATEMENT

None of the numerous questions which petitioner presents for review are legitimately raised by the instant case. In fact, each is based on substantial and material mischaracterizations of the record (*cf.*, 123a).

None of these questions were deemed worthy of discussion by the Court of Appeals for the Second Circuit.

REASONS FOR DENYING THE WRIT

I.

THIS CASE INVOLVES INTENTIONAL DISCRIMINATION, NOT AFFIRMATIVE OBLIGATIONS.

The petitioner asserts that this case imposes upon prospective defendants an affirmative obligation with respect to classes of persons who have no relationship with said defendants.

To the contrary, this case merely states that "having assumed the role of the employment referral agency for the Garden, [the Union] had a duty to refer individuals for the position of laborer in a fair manner which did not discriminate on the basis of race or national origin." (132a-133a). Liability was not based on the failure to recruit strangers, much less respondents: rather, it was based on the union's subjective and standardless referral policies and overt actions (30a). Union personnel at the job site and at the union hall *deliberately* frustrated and gave no less than ten applicants the run around. The respondents were of all people most likely to seek a laborer position (41a). The unchallenged finding of the District Court, as affirmed by the Court of Appeals, was that the practices and procedures of the petitioner were designed and implemented with intent to foreclose the respondents, on account of their race, from the opportunity to become laborers.

This finding, *i.e.*, intentional deprivation of opportunity, belies petitioner's argument that this is an affirmative obligation case.

II.

THE STATUTE OF LIMITATIONS IS NOT AN ISSUE IN THIS CASE.

The petitioner asserts that a one-year statute of limitations should be applied to 42 U.S.C. §1981 (1976) instead of the three-year statute of limitations provided by N.Y. Civ. Prac. L. & R. §214(2) (McKinney 1972 & Supp. 1981-1982) which is used for action[s] to recover upon a liability "imposed by statute". §214(2) has been applied consistently to §1981, and its application is based on sound principles of statutory construction.

In any event, the question is virtually immaterial in the context of this case.

First, respondents alleged and proved that the petitioner's referral system constituted a continuing violation. The petitioner has not challenged that determination. The doctrine of continuing violation has been explicitly recognized by the Supreme Court. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982). The District Court found that the petitioner's referral policy had been in effect since at least 1969-1970 and continued through the time of the trial; thus, the claims were timely because the illegal system necessarily existed within the limitations period (153a).

Second, the §1981 claims are timely even utilizing a one-year statute of limitations. The Ingram and Anderson complaints against Local 3 were filed, respectively, on May 20, 1977 and March 3, 1978. Laborers were hired pursuant to Local 3 referrals on December 20, 1976, March 25, 1977 and October 11, 1978. Victim class members established that they were discouraged from applying for the laborer position because of the union's discriminatory policies on June 1, 1976 and in April, 1978 and a union official gave misleading information to class members in April and November, 1978.

Third, the Title VII class, whose timeliness is not here challenged, predates the §1981 classes, *i.e.*, EEOC complaint filed November 24, 1975, limitations date March 31, 1975. The only effect of a bar to the §1981 actions would be to divest Francisco Hernandez (the sole hispanic respondent of eighteen persons receiving backpay and the only one not in both §1981 classes and the Title VII class) of his backpay award. In accordance with the opinion of the Second Circuit, Hernandez' award would then be divided among the seventeen remaining individuals whose claims were predicated on Title VII. (The Title VII backpay awards were subject to a maximum recovery date of November 24, 1973 and the §1981 maximum recovery date was later — May 20, 1974) (90a-91a). All seven class members whose backpay awards were used by the Second Circuit to set the total backpay awards were members of the Title VII class. Thus, there would be no reduction of the total award.

Finally, even petitioner concedes that there is no conflict among the circuits regarding the applicable state statute of limitations for cases arising under §1981.

III.

UNION "AGENCY" IS NOT AN ISSUE IN THIS CASE.

The petitioner alleges that unions should receive preferential treatment regarding "agency" and backpay questions under Title VII and §1981.

42 U.S.C. §2000e-5(g) contemplates that a "labor organization" as well as an employer may be held liable for backpay. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408 (1975). In any event, plaintiffs established that the discriminatory referral policy was that of the union, not merely that of its delegates or shop stewards and that as a result of Local 3's referrals, the laborers had been a segregated group since at least 1948 (27a, 28a).

When the question of agency arose before and at trial, petitioner *specifically* waived this issue. Respondents had made formal discovery requests regarding information about the Union's activities other than at the Garden. In response, on November 6, 1978 Local 3's counsel sent a letter to the court in which he made an "explicit stipulation that [representative] O'Hara's acts are binding upon the Union." At trial, on the record, Local 3's counsel represented that another union official, the shop steward, was an authorized spokesman and representative of Local 3 regarding procedures for becoming a laborer. Thus, this case does not present any question regarding the "standard of determination of union agency".

IV.

THE OTHER OBJECTIONS TO BACKPAY ARE NOT BASED ON THE RECORD.

The petitioner has presented four other objections to the backpay awards.

A. The Futility of Taking Steps to Obtain a Laborer Position Was Real.

Petitioner asserts that non-applicant victim respondents did not clearly prove the actual futility of obtaining a laborer's position.

To the contrary, the respondents proved that no cleaner had ever been able to transfer into the laborers' gang, that the cleaners knew that the few minorities who were able to obtain such jobs were already members of Local 3, and that cleaners who had tried to find out how to get the job were given the runaround. The District Court found that feelings of futility on the part of the cleaners were justified. After hearing fifty witnesses, the Magistrate found that the union

> offered no proof displacing the inescapable finding which underlies Judge Sand's decisions and which I find to be sustained in all the testimony before me, that the futility of taking steps to seek a laborer's position was real, apparent and well known to the claimants.

Judge Sand specifically reiterated this finding (137a).

B. Respondents Did Not Fail to Mitigate Damages.

The petitioner asserts that the cleaners, full time employees at the Garden, in order to mitigate damages, should have left their jobs and sought laboring positions outside of the Garden by speaking to their own union.

In support of its assertion, petitioner cites provisions of 42 U.S.C. §2000e-5(g) requiring awards to be offset by amounts earnable with reasonable diligence. The cleaners union is a service employees union. Local 3 presented no testimony that, *e.g.*, any cleaner even knew that their union represented any workers who did laboring work. The District Court found that the petitioner failed to meet the burden of showing that the cleaners would have found employment with greater earnings than they already had (143a).

Ford Motor Co. v. EEOC, cited by petitioner, is inapposite to the facts of this case. Here, the laborer jobs at the Garden, the subject matter of this lawsuit, were not available to the cleaners, with or without seniority. There has been no showing that any cleaner passed up an opportunity to obtain a higher paying job, much less refused a job offer from a defendant attempting to abate damages, as was the case in *Ford*. The union made several laborer referrals over three years following notice of pending charges at the EEOC. It persisted in not offering a referral to a cleaner.

C. Disciplinary Records Would Not Have Been the Basis of a Hiring Decision.

The petitioner asserts that the disciplinary records of some of the claimants would have prevented them from being hired as laborers. The District Court rejected this argument since the prior work records of laborer referrals were never reviewed, and, therefore, the records would

> not have been the basis for a decision not to hire particular claimants, all of whom were continued in their employment at the Garden subsequent to the alleged infractions (145a).

There were no objective or subjective job qualifications for the position of laborer. The Garden only needed a "slip" from the union. The union delegate knew little or nothing about the acquaintances or friends of acquaintances that he referred.

Texas Department of Community Affairs v. Burdine, cited by petitioner is totally inapposite. Here, there was no "misjudgment of an applicant's objective job qualifications." No respondent ever got far enough to have his qualifications misjudged.

D. The Union Did Nothing to Reduce or Abate the Cleaners' Damages.

The petitioner argues that it had done all it could do when, in 1977, a union official raised to the Garden the possibility that more minorities be referred, and, consequently, that the damages should then have abated. Local 3, as the exclusive referral authority, was in a uniquely advantageous position to abate its own damages by referring class members to the job. Indeed, it made at least four referrals subsequent to the District Court's

relief decision — not one class member was referred. Moreover the petitioner then relinquished any further opportunity to abate damages by refusing to make further referrals.

The District Court rejected the union's argument because the union had neither shown nor contended that any of its actions resulted in any reduction of plaintiffs' compensable injuries (141a).

V.

THE CLASS BENEFITED FROM THIS LITIGATION.

Petitioner contends that the attorneys' fee award was excessive allegedly because respondents obtained no class benefit.

The class certainly did benefit from this litigation. All seven class transferees to the position of laborer have been awarded full seniority. The Garden now hires class members as laborers in accordance with the terms of the consent decree and Local 3, rather than regularize its referral practices, has stipulated to remove itself from the referral process. Eighteen class members will share the $345,732 backpay award. Contrary to the statements of petitioner, this entire backpay award will be paid directly to respondents — it will not be shared by counsel through contingency retainers or otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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